3944.

SUPREME COURT OF THE UNITED STATES.

No. 197.

SAMUEL VERDEN, PL'FF IN ER.,

vs.

ISAAC COLEMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

INDEX.

	Original.	Print.
Complaint	2	1
Answer to complaint	9	4
Demurrer to answer overruled	26	10
Reply to answer	27	10
Demurrer to reply overruled	59	22
Judgment of circuit court	60	23
Bill of exceptions	61	23
Certificate of clerk of Benton circuit court	70	27
Proceedings in supreme court—assignment of errors	71	27
Judgment of supreme court	74	28
Appeal prayed and granted	74	28
Appeal bond	75	28
Clerk's certificate	76	29

Pleas began and held at the State-house in Indianapolis, before the honorable James L. Warden, Chief Justice James M. Hanna, Samuel E. Perkins, and Andrew Davison, judges of the supreme court of the State of Indiana.

Appeal Benton C. C.

SAMUEL VERDEN
vs.
ISAAC COLEMAN.

Be it remembered, that at a court began and held on the 26th of May, 1856, and continuing from day to day, until the 29th of May, 1856, at which time comes the appellant, by his attorney, and files with the clerk of the supreme a transcript of the proceedings of the court below, in the above entitled cause, which said transcript is in the words and figures following, to wit:

STATE OF INDIANA,
Benton county, ss.

Pleas began and held at the court-house, in the town of Oxford, in said county, on the 10th day of March, A. D. 1856, it being the second Monday of said month, before the honorable Andrew Ingram, judge of the Benton circuit court, in the State of Indiana.

Complaint to foreclose mortgage, $3,134.86-100.

ISAAC COLEMAN
vs.
SAMUEL VIRDIN.

Comes now the plaintiff, by J. R. M. Bryant and Z. Baird, his attorneys, and files the following complaint in this behalf, to wit:

In the Benton cir. court, of the March term thereof, 1856.

STATE OF INDIANA,
Benton county, ss.

Complaint to foreclose a mortgage.

ISAAC COLEMAN
vs.
SAMUEL VERDIN.

The plaintiff complains of the defendant, and says that the

defendant, on the 10th day of April, 1850, executed to the plaintiff the promissory note and mortgage, copies of which are herewith filed and marked, the former "A," the latter "B," and read in the words and figures following, to wit:

"2,315. ATTICA, April 10, 1850.

One year from this date, I promise to pay Isaac Coleman or order two thousand three hundred and fifteen dollars, without relief from valuation or appraisement laws, for value received.

SAMUEL VIRDIN."

"This indenture, made this tenth day of April, A. D. eighteen hundred and fifty, between Samuel Virdin, of the county of Tippecanoe, Indiana, of the first part, and Isaac Coleman, of the county of Fountain, and State aforesaid, of the second part, witnesseth: That the said party of the first part, for and in consideration of one dollar, lawful money of the United States, by the said party of the first part in hand duly paid, the receipt whereof is duly confessed and acknowledged, by and on the part of the said party of the first part, has, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, his heirs or assigns, all the following described piece or parcel of land, to wit: the east half of the southeast quarter of section thirty-six, in township twenty-six north, of range ten west; the southwest fractional quarter of section thirty-one, township twenty six north, of range nine west; the east half of the northeast quarter of section one, in township twenty-five north, of range ten west; the north half of the northwest quarter of section six, in township twenty-five north, of range nine west; the northeast quarter of the southwest quarter of section thirty-six, in township twenty-six north, of range ten west; and the west half of the northeast quarter of section number one, in township twenty-five north, of range ten west, containing in all three hundred and fifty-nine and sixty-one hundreths of an acre, together with all and singular the hereditaments and appurtenances to the same belonging, or in anywise appertaining: To have and to hold the same unto the said party of the second part, his heirs and assigns forever; provided, nevertheless, and these presents are upon this express condition, that if the said party of the first part, his heirs or executors, shall well and truly pay, or cause to be paid, unto the party of the second part, his executors, administrators, or assigns, the just and full sum of two thousand three hundred and fifteen dollars, in one year from this date, with interest from date, as evidenced by a promissory note of this date, then these presents shall be null and void. But in case of the non-payment of the said sum of money at the time above specified, or of the interest thereof, or any part of such principal or interest, then and in such case it shall and may be lawful, and the said party of the second

part, his heirs, executors, administrators, or assigns, is hereby expressly authorized and empowered, by the said party of the first part, to sell the premises and lands hereinbefore described at public auction or vendue to the highest bidder therefor, after having given legal notice of such sale by advertising the same for the time, and in the manner as provided by statute, and upon such sale to make, execute, acknowledge, and deliver to the purchaser or purchasers, and his heir, or their heirs or assigns, a good and sufficient deed or deeds in law, to transfer, convey, warrant, and defend unto the said purchaser or purchasers, his heir, or their heirs or assigns, the fee simple of said premises, rendering the overplus (if any) there shall be after paying the principal and interest which may then be due on this mortgage, and the costs and expenses of said sale unto the said party of the first part, his heirs, executors, administrators; or the said party of the second part, his executors or administrators, may proceed by bill in chancery, and foreclose this mortgage for any default herein.

In witness whereof, the said grantor has set his hand and seal, on the day and year first above written.

SAMUEL VERDEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
DANIEL MACE.

STATE OF INDIANA,
Fountain county, sct.

Be it remembered, that on this tenth day of April, A. D. 1850, personally came before me, the undersigned, a notary public of said county, Samuel Verden, to me well known as the same person described in , and who executed the foregoing deed of mortgage, and acknowledged the same to be his voluntary act and deed, for the uses and purposes therein mentioned.

[L. S.] In witness whereof, I have hereunto set my hand and official seal, this tenth day of April, 1850.

DAVIS NEWALL.

Recorded June 29th, 1850.

HARTLEY T. HOWARD,
Recorder B. C.

A true copy.

HARTLEY T. HOWARD,
Fee $1.00. *Recorder Benton county."*

Whereby he conveyed to the plaintiff the lands described in said mortgage to secure the sum of money specified in said note. The plaintiff further says, that when the said note was executed, it was the intention of the parties that the same should bear interest from its date, which was omitted by mistake or inadvertence to be expressed therein; wherefore, the plaintiff asks judgment for four thousand dollars, and the foreclosure of the mort-

gage and sale of the mortgaged property, or so much thereof as may be necessary to pay his debt, without relief from valuation or appraisement laws, and for other proper relief.

J. R. M. BRYANT and
Z. BAIRD,
Att'ys for Plff.

And thereupon comes the defendant, and waives the issuing and service of process in this behalf, and files his answer to said complaint, as follows, to wit:

In the Benton circuit court, of the March term thereof, 1856.

STATE OF INDIANA,
Benton county.

Complaint to foreclose a mortgage.

SAMUEL VERDEN ads. ISAAC COLEMAN.

The defendant, for answer to said complaint, says that on or about the date of said mortgage and note, he purchased from one Samuel Coleman and said Isaac Coleman the following described lands, to wit: The east half of the southeast quarter of section thirty-six, in township seventy-six north, of range ten west; the southwest fractional quarter of section thirty-one, township twenty-six north, of range nine west; the east half of the northeast quarter of section one, in township twenty-five, north of range ten west; the north half of the northwest quarter of section six, in township twenty-five north, of range nine west; and the northeast quarter of the southwest quarter of section thirty-six, in township twenty-six north, of range ten west, all situated and being in the said county of Benton; that at the time of the said purchase, one Isaac O. Banta held the legal title to said lands, in trust for said Coleman, and that he, at the proper instance and request of said Coleman, made a deed therefor to this defendant; that at the same time, this defendant also purchased from said Coleman the following other lands, to wit: the west half of the northeast quarter of section number one, in township number twenty-five north, of range number ten west, situated, lying, and being in the county aforesaid, which said last mentioned tract of land was at the time conveyed to your orator by the said plaintiff; that the consideration for which said lands were sold and conveyed as aforesaid, was the sum of four thousand three hundred and fifteen dollars; that the defendant at the time paid cash down the sum of two thousand dollars, and gave his promissory note for the sum of two thousand three hundred and fifteen dollars, payable to said Isaac Coleman, which note bears date of the day of said sale, and is payable one year after date, and should be with interest from date. This defendant admits the execution of the note and mort-

gage, copies whereof are made parts of the complaint for the purpose, and at the time specified in the complaint.

The defendant, further answering, says that a part of said lands so sold as aforesaid, and for which said two thousand dollars were paid and said note given, to wit, the northwest fractional quarter of section thirty-one, in township twenty-six north, of range nine west, was patented by the United States to Hannaniah Hewett, on the 10th day of August, 1841, a copy of which patent is filed as a part of this answer, marked "A," and reads as follows, to wit:

Pre-emption certificate No. 33,776.

The United States of America to all to whom these presents shall come, greeting:

Whereas Hannaniah Hewitt, of Benton county, Indiana, has deposited in the General Land Office of the United States, a certificate of the register of the land office at Crawfordsville, whereby it appears that full payment has been made by the said Hannaniah Hewitt, according to the provisions of an act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of the public lands, for the southwest fractional quarter of section thirty-one, in township twenty-six north, of range nine west, in the district of lands subject to sale at Crawfordsville, Indiana, containing eighty-two acres and sixty-nine hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Hannaniah Hewitt. Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Hannaniah Hewitt, and to his heirs, the said tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and *appurtinences* of whatsoever nature thereunto belonging unto the said Hannaniah Hewitt, and to his heirs and assigns forever.

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office hereunto affixed. Given under my hand at the city of Washington, the tenth of August, in the year of our Lord one thousand eight hundred and forty-one, and of the independence of the United States the sixty-sixth.

[L. S.]

JOHN TYLER.

By the President:

By R. TYLER, *Sec'y*.

Joseph Wilson, acting recorder of the General Land Office ad interim. Recorded: vol. 68, page 452."

The defendant avers that said Banta and Colemans' claim title to said last named lands through Hewitt, and in no other way; that they nor either of them ever had or pretended to have any title or interest in said lands, only by and through said Hewitt, he claiming wholly by virtue of said patent; that said last named land is of greater value, being in a small grove in the midst of the Grand Prairie, where timber and water are quite, if not very scarce; that it is well timbered, and water running through it; that without it the other tracts of land conveyed as aforesaid, are not worth more than the two thousand dollars paid down as aforesaid, and that the said Banta and said Coleman, nor either of them, had any title to said lands at the time they were sold and conveyed as aforesaid, nor have they nor either of them had any title to said land last named, or any part thereof since said sale, and therefore the consideration for said note has wholly failed, or rather there was never any consideration therefor.

The defendant further avers that the deed made to him by the said Banta, and the said deed made to him by the said Isaac Coleman, and the note and mortgage aforesaid executed by your orator to Isaac Coleman, were all made, executed, and delivered with the full knowledge, consent, and approbation of said Isaac Coleman, Samuel Coleman, and Isaac Banta, and that the contract for said lands and all of them was an entire contract, although separate conveyances were made as aforesaid. In order to show that said Banta and Colemans never had any title to said lands, this defendant shows and charges that in the year 1832, about the 27th of October of that year, the United States of America made and concluded a treaty of purchase with the Pottawottamie Indians, of a large tract of country, including the last named tract of land, by the terms of which treaty, amongst other reserves, one section of land was reserved to an Indian by the name of To-pen-ne-be, to be located under the direction of the President of the United States. That after said treaty was made and concluded, and long before the date of said Hewitt's patent, the President of the United States appointed Douglas to locate and set apart the reserved tracts of land to the persons named in said treaty; that by virtue of said appointment, said Douglass entered upon the discharge of his duty, and made a report of his doings to the proper government department, at the city of Washington, on the 20th January, 1836, which report was duly approved by the President of the United States, Martin Van Buren, on the 29th of March, 1837.

Said report, approval, certificate of Commissioner of Indian Affairs, and certificate and seal of Secretary of the Interior, is made a part of this answer, and marked "A," and reads in the words and figures following, to wit:

3948
7

"WASHINGTON, 20th Jan'y, 1836.

Hon. O. A. HARRIS:

SIR: I have the honor to report the following selections for persons entitled to land, under the treaty 27th October, 1832. For Old Wa-saw, E. ½ section 23, T. 36, R. 8 W., 2d meridian. In obedience to your order of the above date, I have selected for Wis-no-qui, section 14, T. 32, R. 4 E., and section 10, T. 32, R. 4. These three selections are in lieu of sections 10, 11, 14, in town. 33, R. 6 E., rejected, because they were located in Wis-qui-qua Buck reservation, out of treaty 1832; to *to* Ben-na-bu, sect. 31, T. 26, R. 9 W.; for M. A. Bruner, lots No. 184, sec. 31, T. 37, R. 7 W.; for Chops T. Tuck, alias John Payne, section 13, T. 32, R. 4 E.; Moglu, S. ½ sec. 27, T. 36, R. 10 E., 3d merd., Illinois.

Respectfully,

J. T. DOUGLASS.

List of reserves located under the treaties with the Pottawottamies of 1832, by Mr. J. T. Douglass, pursuant to instructions from the department.

Reserves: We-saw, sec. 31, T. 36, R. 7 W., 2d md., State of Indiana, in lieu of section 32, T. 36, R. 6 W., covered by improvements; Saw-ga-na, sect. 5, T. 36, R. 8, 2d md., in lieu of 30, 36, 5 W.; John B. Duchane, tract sect. 19, T. 36, R. 7 W., 2d md., in lieu of 18, 36, 6 W. do.; Francis Page, jr., south ½ sec. 32, T. 37, R. 7 W., 2d md., in lieu of S. ½ 11, 33, 5 E.; children of Mary Lacombe, N. ½ sec. 2, T. 33, R. 3 E., 2d md., in lieu of W. ½ 19, T. 36, R. 1 E.; Mis-no-qui, sec. 10, T. 32, R. 4 W., 2d md., in lieu of first location, which was covered by improvement, and sec. 14, T. 32, R. 4, sec. 1, T. 36, R. 8 W., 2d meridian; the Apo Turkey, sec. 34, T. 36, R. 7 W., 2d meridian, in lieu of section 6, T. 36, R. 7 W.; Po-ka Kause, south part of northwest quarter lot No. 2; west half of the southwest quarter or lot No. 3; SE. ¼ of W. ½ section 31, township 37, R. 7 W., in lieu of N. ½ of section 32, township 35, 5 W.; Joe Bewison, NW. qr. of section 36, township 34, R. 1 E., 3d meridian, in lieu of SE. qr. section 6, township 35, R. 5 west; James Burnet, section 13, township 35, R. 4 E., in lieu of section 27, township 33, R. 6 E.; You-se-qua, wife of Joe Barley, section 27, township 33, R. 3 E., in lieu of 33, 36, 14 E.; Shaw-co-wah-tuk, E. ½ of SE. quarter, SW. quarter of the SE. quarter of 27, 30, 12 E., approved, since ascertained that there is no section thus designated; Anbe-nau-bee, section 17, township 36, R. 7 W., in lieu of 35, 29, 5 E., which was approved, but found to be of no value; do. section 8, township 37, R. 15 E., 3d md., Illinois; Na-kaw-diz-zan-dee, SW. qr. section 32, township 36, 3 W., 2d md., Indiana, in lieu of NW. qr. 29, 36, 4 W.; Ash-kam, tract section 4, township 36, range 8 W., Indiana, in lieu of 13, 31, 11 E.; do. tract E. of the old Indian line, section 7, township 37, R. 15 E., 3d md., Illinois; Be-si-ah, tract

section 36, township 37, R. 8 W., 2d md., Indiana, in lieu of first location, south part section 6, township 36, R. 7 W., Indiana, lying south of old Indian boundary line, in lieu of S. ½ 34, 34, 6.; Van-a-tan-nant, N. ½ section 26, township 33, R. 3 E., 2d md., Indiana, for SW. ¼ lying E. of the treaty line of 1846, section 5, township 37, R. 15 E., 3d md., Illinois, in lieu of a full quarter; Pe-nem-chis, E. ½ of section 36, township 32, R. 10 E., 3d md., Illinois, in lieu of E. ½ sect. 8, 35, 4 W; Genica, section 13, township 31, R. 13 E., 3d md., Illinois, in lieu of 18, 31, 14 E.; J. B. Saclare, or Battiste Saclare, ½ section 31, township 32, range 11 E., 3d md., Illinois; the 5 daughters of Monroe, section 31, town. 36, range 14 E., 3d md., Illinois; section 32, township 36, range 14 E., 3d md., Illinois; F. Besior, E. ½ section 24, township 31, range 13 E., 3d md., Illinois, in lieu of W. ½ of 17, 31, 4 E.; Sawguts, W. ½ section 18, township 31, range 14 E., 3d md., Illinois, in lieu of W. ½ 4, 29, 12 E., approved, but error described the tract; Wa-me-ne, son of Wo-ram, NW. qr. section 19, township 31, range 13 E., 3d md., Illinois; Wi-sa-wa, section 15, township 30, range 13 W., 3d md., Illinois—this is the same land which was designated and approved as the W. ½ 22, 30, 12 E., Illinois; Pe-le-na-an, W. ½ section 22, township 30, range 13 E., 3d md., Illin's; Charles Chandend, E. ½ section 7, township 29, range 13 E., 3d md., Illinois, designated and approved as E. ½ 9, 29, 12 E.; Wa-ba-za, SW. qr. section 3, township 29, R. 13 W., 3d md., Illinois, approved under the designation of SW. qr. of section 32, 9, 12 E.; May-see, S. ½ section 27, township 36, range 14 E., 3d md., Illinois, in lieu of W. ½ of 21, 35, 3 W., approved, but conflicting with pre-emption rights, has, by consent of the assignee of the reserves, been re-located; Pierre Namavee's wife, section 10, township 29, range 13 W., 2d md., Illinois, designated and approved as 10, 29, 12 E.; To-pen-na-bee, section 31, township 36, range 9 W., 2d md., Illinois, in lieu of 19, 36, 5 W.; M. A. Bruier, lots No. 1 and 4, section 3, township 37, R. 7 W., 2d md., Illinois, in lieu of NE. qr. 9, 34, 5 west, approved, but condemned as of no value; Chop-a-tuck or John Payne, section 13, township 32, range 4 E., 2d md., Ill's, in lieu of 23, 35, 5 W. do. do.; Rou-sau, NW. qr. section 26, township 33, range 4 E., Illinois. The location by the agents, but through mistake, was approved to NE. qr. 9, 35, 3 W., which should be reversed. The preceding locations of reservations are respectfully recommended to be submitted to the President for his approval.

Office of Indian Affairs, March 28th, 1837.

C. A. HARRIS, *Com'r.*

Respectfully submitted for the approval of the President.

War Department, March 29th, 1837. J. R. POINSETT.

Approved March 29th, 1837.

M. VAN BUREN.

The above suggestions are approved, and requested to be carried into effect. August 28th, 1835.

ANDREW JACKSON.

GENERAL LAND OFFICE, *May* 19, 1851.

I, Justin Butterfield, Commissioner of the General Land Office, do hereby certify that the foregoing five pages, and the portion of this, the sixth page, which precedes this certificate, are duly copied from the files of this office.

In testimony whereof, I have hereunto set my hand and caused [L. S.] the seal of the General Land Office to be affixed, the day and year above written.

J. BUTTERFIELD, *Com'r.*

This plaintiff further replying, saith that he admits that the United States of America, about the time alleged in said answer, made and concluded a treaty with the Potawottamie Indians, by which the chiefs and warriors of said Indians ceded to the United States of America a large tract of country; but he denies that by the terms of said treaty, a section of the land so called was reserved to the said To-pen-ne-ba, but he admits the United States did in and by said treaty agree to patent to said To-pen-ne-ba one section of land, not agreeing that the same should be granted to him out of the lands ceded, but only agreeing that the same should be conveyed to said To-pen-ne-ba by patent, and which was to be located under the directions of the President of the United States. This plaintiff admits the appointment by the President, after said treaty, of the said J. T. Douglass to locate said land, also the entry of said Douglas, in pursuance of his said appointment, upon the discharge of his duties. The report by him made, which is made a part of said answer, and the approval thereof by the President.

This plaintiff further replying, fur denies that the report and approval vested any title in said To-pen-ne-ba in said land so set apart to him, but insists that the same remained subject to the control of the President until a patent should issue in pursuance of such location.

This plaintiff further replying, says that the said Douglass and the said To-pen-ne-ba, at the time said location was so made, well knew of the existing equitable title to said land of the said Hewitt, but that the President approved said location inadvertently, and without knowledge of the said Hewitt's title.

This plaintiff further replying, says that the said Douglass, in making said location, acted in direct violation of the orders issued to him from the Treasury Department, under the sanction of the President, a duly certified copy of which said order from the Treasury Department is to be found among the papers contained in "exhibit A," and is above made a part of this reply.

This plaintiff further replying, saith that in 1838 the receiver and register of the land office at Crawfordsville notified the General Land Office of the claim which had previously, as above stated, been made to them by said Hewitt as a pre-emption to said lands described in said patent, and evidence was then forwarded to the department of said claim and testimony to support the same. Notice whereof was then given by the General Land Office to the War Department, by which latter department, under the direction of the President of the United States, the matter was referred to the Commissioner of Indian Affairs to examine said evidence, and report upon the validity of the claim of said Hewitt, and upon the propriety of said location; which said Commissioner made a report in the premises to said department, on the 20th April, 1839, and which report was duly concurred in by Joel R. Poinsett, the then Secretary of War, on the 24th of April, 1839.

A copy of said report and of the said approval, duly certified, and the authentications thereto appended are herewith filed, marked exhibit B, and made a part of this reply, and read in the words and figures following, to wit:

(Copy.)

WAR DEPARTMENT,
Office Indian Affairs, 20th April, 1839.

SIR: By the 3d article of the treaty of 27 October, 1832, with the Potawatomies, there is reserved to To-pen-na-bee, principal chief, "one section of land, to be selected under the direction of the President of the United States." The selection was made on the 20th of January, 1837, and was approved by the President on the 29th of March, 1837. Of this location, Hannaniah Hewitt claims eighty acres, by virtue of a settlement and improvement thereon made in the winter of 1832. It appears that the Indian chief was located on section 31, township 26 N., and range 9 west, second meridian, Indiana; and when it was submitted for the President's approval, no evidence existed here that any portion of it was claimed adversely. On the seventh of September, 1838, this office was first advised of the claims of Hewitt, by a communication from the General Land Office, which covered testimony in support of his right, with a memorandum made at this office—"proof sufficient if made in time, but one of the tracts covered by an Indian float." Hewitt states that he settled on the W. ½ of SW. ¼ of section 36, T. 26, R. 9 west, and the E. ½, SE. ¼ of section 36, T. 26, R. 10, being contiguous tracts, in February, 1832, and put up a dwelling-house thereon, in which he has lived ever since; that he had about six acres of corn in the said land on the 19th of June, 1834. In this statement he is confirmed by the deposition of Henry D. Bell, who further says that in surveying the

said land the line dividing the two tracts separate Hewitt's house from his stables and some other improvements. John Nelson testifies to the same effect. By the law of 19th June, 1834, S. 1, it is enacted "that every settler or occupant of the public lands prior to the passage of this act, who is now in possession and cultivated any part thereof in the year one thousand eight hundred and thirty-three, shall be entitled to all the benefits and privileges provided by the act entitled "An act to grant pre-emption rights to settlers on the public lands," approved May 29, 1830, "and the said act is hereby revived, and shall continue in force two years from the passage of this act, and no longer." The second section provides, "that when a person inhabits one quarter section, and cultivates another, he shall be permitted to enter the one or the other at his discretion: *Provided*, Such occupant shall designate within six months from the passage of this act the quarter section of which he claims the pre-emption under the same."

A report from the register and receiver at Crawfordsville, Indiana, dated 29th November, 1838, states that Hewitt made three several applications to the former register of said office to prove his claim under the pre-emption law of 1834, but was not permitted to do so, in consequence of the township plats not having been returned to the office while the law was in force. By said law he was entitled to a quarter section of land, with a fair and legal right thereto, as soon as the law passed, and he did all in his power to have this right recognized.

On the 22d June, 1838, the pre-emption law above named was extended, and provided that settlers, at its enactment, and for four months next preceding, should be entitled to all the benefits of the law of 1830, which was revived for two years; provided, that where there was more than one settler in a quarter section, they should have it equally, but have no claim to any other land by virtue of said law of 1838. By the 1st sec. of the law of 1830, a settler was authorized to enter with the register of the land office for the district in which such lands may lie, by legal sub-divisions, any number of acres, not more than one hundred and sixty, or a quarter section, to include his improvements. This act was incorporated into the law of 1834, and would seem to entitle a party to take parts of two adjacent sections, restricting him only to take only by legal sub-divisions. The second section of the law of 1834 may appear to conflict with such right, but the greater object of that provision was probably to prevent a settler from asserting a right to detached parcels of land. This view is fortified by the seventh paragraph of instructions to registers and receivers, issued by the General Land Office on the 22d of July, 1834, which is in these words:

"Where an improvement is situated on different quarter sections, the claimant is entitled to enter such two adjacent legal sub-divisions (viz., the east and west half quarters) as will include

his improvements;" and also by the entry already referred to in the evidence in this very case, "proof sufficient if made in time, but one of the tracts covered by an Indian float." If the idea suggested be correct, Hewitt's difficulty is made by time and the conflicting location for the Indian chief.

As to the latter, it was made on the 20th January, 1837, and apparently directly in the face of instructions of the 27th of August, 1835, embodied in a communication from the Secretary of the Treasury to the President of the United States, and approved by him, which forbid the agent to locate for the Indians lands that were settled on, and claimed under the pre-emption laws of which persons had settled themselves *nor* entitled as pre-emptors, who were waiting the approach of the public sales to compete for the purchase of the same. The location for To-pen-na-bee was approved by the President of the United States on the 29th of March, 1837. Hewitt not being permitted to come under the law of 1834, was allowed to enter an eighth of a section, or 80 acres, under the law of 1838, out of section 36, T. 26, R. 10 W., there being no other settler on the same quarter, which was divided between them. He now claims 80 acres more out 31, 26, 9, upon which is a part of his buildings and cleared land, and which adjoins his other 80 acres, so that he can take both by "adjacent legal sub-divisions." The approval of the President to the Indian location is the greatest difficulty, and would be regarded as insuperable were it not that heretofore, in a case approved on the same day, viz., that of Mary Ann Bruner, upon its being shown that the land located for her had been previously entered and paid for, the approval was reconsidered and reversed. Regarding this precedent as binding on me, it follows that, if Hewitt stands within range of the reason that settled the Bruner case, the approval of the President will be regarded as made under a misapprehension of the facts, and yield. He did not enter and pay for the land, but he offered to do so, at three different times. It was owing to no neglect or fault of his that this was not done; his proposition was rejected by the land officers, because they had not the township plats. Equitably he occupies precisely the same ground as if the entry and payment had been made, which he did every thing he could to perfect. The delay was protracted until the law of 1834 expired by its own limitation.

The circumstances of Hewitt's entering 80 acres under the law of 1838, is no waiver of his present claim. It is reasonable to presume it was done, either in the apprehension he might lose all, or because he was told truly that it was the only law under which an entry could be made then. It was a measure of prudence to disincumber as much of his land as he could of controversy. He was clearly entitled once to come in for what he now claims under the law of 1834. Can an order be made by which he shall have his entry *nunc pro tunc?* It would at first blush

seem to be reasonable, but no powers are possessed by the executive except those which the law confers. The one above referred to has ceased to operate, except as revived, with conditions by the law of 1838, and I think all power to perfect rights commenced under it gone. I know of no authority short of an act of Congress which can give him what I conceive to be his just rights, for it would be a grevious hardship, that a man who had built on and cultivated a farm so long ago as 1832, should be arrested by a floating right located in 1837; and that with full notice to the claimant for his adversary's stables, and out-houses and cleared land, were upon the very ground he claims, I do not doubt a law, upon a proper representation, will be passed for his relief. The location for To-pen-na-bee ought, it appears to me, to be set aside for the 80 acres of section 31, township 26, R. 9. It was not only made in the face of another man's rights, but directly contrary to the instructions of the locating agent, who was directed not to locate any lands for the Indians that were settled on and claimed under the pre-emption laws, or on which persons had settled themselves not entitled as pre-emptors, who were awaiting the approach of the public sales to compete for the purchase of the same. Hewitt claimed always under the pre-emption laws, and does now; and admitting he cannot be such at this day, he answers the other descriptions, and can buy at public sale. There is no merit in the claim under the To-pen-na-bee right. All the equity seems to me to belong to Hewitt, and I therefore recommend that the Indian location, so far as it covers the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of section 31, T. 26, R. 10 west, be set aside. This will open the door for Hewitt, and enable him to take the necessary steps for obtaining the title to a small tract of land that he has been making more valuable every day for the last seven years.

Very respectfully, your mo. ob't serv't,
T. HARTLEY CRAWFORD.

Hon. J. R. POINSETT,
Secretary of War.

Upon the foregoing report, is the following endorsement by the Secretary of War:

"April 24th, 1839, report concurred in and approved."
"J. R. P."

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, July 17th, 1851.

I, Charles E. Mix, Acting Commissioner of Indian Affairs ad interim, do hereby certify that the foregoing is a true copy of the original on file in this office.

CHARLES E. MIX,
Acting Com'r ad interim.

UNITED STATES OF AMERICA.

I, Alexander H. H. Stewart, Secretary of the Interior, do hereby certify that Charles E. Mix, whose signature is annexed to the foregoing certificate, is now, and was at the time of signing the same, Acting Commissioner of Indian Affairs ad interim, and that full faith and credit are due to his official acts as such.

In testimony whereof, I have hereunto set my hand and caused the seal of said department to be affixed, this 17th day of July, 1851.

[L. S.]

ALEX. H. H. STEWART.

This plaintiff expressly denies that it is true as charged in said answer, that neither this plaintiff or said Banta had any title to said lands described in said patent, when the same were so conveyed to said defendant; but, on the contrary, he insists that by said conveyance said defendant received and became possessed of a sure and indefeasible title in fee simple of, in, and to said lands.

This plaintiff denies that the said land described in said patent, is of the value mentioned in said answer, but admits the same to be of the value of from 12 to 15 dollars an acre.

This plaintiff further replying, saith that he denies that said To-pen-ne-ba, or his grantees or his grantee, is now in possession of said land as described in said patent; but, on the contrary, he charges that the plaintiff and the said Samuel were in possession of said land at the time of said purchase by said defendant; and that immediately after said purchase, Sumner was placed in possession of said land under said Verden, and made the said title so conveyed to him; all which this plaintiff will aver, maintain, and prove, as this honorable court may direct, &c.

ISAAC COLEMAN,
J. R. M. BRYANT,
MARSHALL M. MELFORD, and
Z. BAIRD,
Solicitors for Plaintiff.

And, thereupon, the defendant files the following demurrer to said reply, to wit:

VERDEN ads. COLEMAN.

The defendant demurs to the reply of said plaintiff, and every paragraph thereof, and says that the same is not sufficient in law.

MACE and WILSON,
Att'ys for Def't.

Which demurrer the court overrules, and adjudges said reply a sufficient reply to said answer; and, thereupon, this cause is sub-

mitted for trial to the court without the intervention of a jury, by consent of the parties; and thereupon the court finds that there is due from the defendant to the plaintiff, on the said debt secured by the said mortgage, the sum of three thousand one hundred and thirty-four dollars and eighty-six cents, and that said mortgaged lands are held and bound for the payment thereof.

It is therefore considered, adjudged, and decreed by the court now here, that unless the said defendant, within thirty days from the date of this judgment, pay the said sum of three thousand one hundred and thirty-four dollars and eighty-six cents, with interest thereon from this date, and the costs of this suit, the lands described in said mortgage, to wit: the east half of the southeast quarter of section thirty-six, township twenty-six north, of range ten west; the southwest fractional quarter of section thirty-one, in township twenty-six north, of range nine west; the east half of the southeast quarter of section one, in township twenty-five north, of range 10 west; the north half of the northwest quarter of section six, in township twenty-five north, of range nine west; the northeast quarter of the southwest quarter of section thirty-six, in township twenty-six north, of range ten west; and the west half of the northeast quarter of section number one, in township twenty-five north, of range ten west, be sold for the payment and satisfaction thereof, as other lands are sold on execution, and that upon such sale being made, the defendant be forever barred and foreclosed of, and from all his equity of redemption of, in, and to said lands; and, thereupon, the defendant files the following bill of exceptions in this case, to wit:

In the Benton C. C., March term, 1856.

THE STATE OF INDIANA,
Benton county.

Be it remembered, that the following was all the evidence given in the final hearing of said cause, to wit:

The plaintiff introduced the original note and mortgage, copies whereof are made parts of this complaint. The defendant read in evidence the original patent from the United States, which is made a part of his answer; also, duly authenticated copies of the report of the said J. T. Douglas, and approved thereof by the President, which are also made a part of his answer. The plaintiff then read in evidence the original deed from Hannaniah Hewitt to Lorenzo D. Hewitt, and from Lorenzo D. Hewitt to Isaac V. Banta, which reads as follows, to wit:

This indenture, made this twenty-third day of October, in the year of our Lord one thousand eight hundred and forty-one, between Hannaniah Hewitt, *his*, and Elizabeth Hewitt, his wife, of the county of Benton, and State of Indiana, of the first part, and Lorenzo D. Hewitt, of the county and State aforesaid, of the sec-

ond part, witnesseth: That the said party of the first part, for and in consideration of the sum of two hundred and seventy dollars, lawful money to him in hand paid, the receipt whereof is hereby acknowledged, doth hereby give, grant, bargain, sell, and confirm unto the said party of the second part, his heirs and assigns forever, the following tract or parcel of land situated, lying, and being in the county of Benton aforesaid, it being known and described as follows, to wit: southwest fractional quarter of section number 31, in township number 26 north, of range No. 9 west, containing 82 acres and 69 hundredths: to have and to hold the premises aforesaid, with all the rights, privileges, and appurtenances thereof unto the said party of the second part, his heirs and assigns forever; and the said party of the first part, for himself, his heirs and executors, covenant and agree to and with the said party of the second part, his heirs and assigns, that he is lawfully seized of the premises aforesaid, and that they are free from all incumbrances, and the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the lawful claims and demands of all persons—the said party of the first part, and his heirs, executors, and administrators will forever warrant and defend. In witness whereof, the said party of the first part have hereunto set their hands and seals this day and year above written.

HANNANIAH HEWITT, [SEAL.]

her
ELIZABETH ⋈ HEWITT. [SEAL.]
mark.

his
JAMES ⋈ MARTIN.
mark.

Signed, sealed, and delivered in presence of—
THOMAS MARTIN.

STATE OF INDIANA,
Benton county, sct.

Be it remembered, that on this day, to wit, the twenty-sixth day of October, A. D. 1841, before me, the undersigned, an acting justice of the peace in and for said county, personally came the within named Hannaniah Hewitt and Elizabeth, his wife, and severally acknowledged that they signed, sealed, and delivered the written deed of conveyance for the use and purpose therein contained. And Elizabeth Hewitt, wife of said Hannaniah Hewitt, being by me first examined separate and apart from her said husband, and the contents of said deed being by me made known to her, acknowledged that she signed, sealed, and delivered the same as her own voluntary act, without any *compulsation* or coercion from her said husband.

In testimony , I have hereunto set my hand and seal the day and year above written.

THOMAS MARTIN, *J. P.* [SEAL.]

I, Orlando Brown, Commissioner of Indian Affairs, do hereby certify that the above and foregoing are true copies from the original file in this Office of Indian Affairs, May 7, 1850.

ORLANDO BROWN, *Com'r.*

DEPARTMENT OF THE INTERIOR,
May 7, 1850.

Be it known, that Orlando Brown, who has signed the above certificate, is the Commissioner of Indian Affairs, and that to his attestations as such full faith and credit are and ought to be given.

In testimony whereof, I, Thomas Ewing, Secretary of the Department of the Interior of the United States, have hereunto set my hand and caused the seal of said department to be affixed, on the 7th day of May, one thousand eight hundred and fifty.

[L. S.]

T. EWING.

By which said report and confirmation aforesaid, it will be seen that the whole of said section 31, in township 36, twenty-six north, of range nine, including the land patented to said Hewitt aforesaid, and sold and conveyed to this defendant as aforesaid, was set apart under said treaty, and in accordance with the terms thereof to the said To-pen-ne-ba, to be held by him, his heirs and assigns forever, all of which was duly recorded in the proper land and war departments at Washington city; which treaty and location under it, and approved by the President aforesaid, fully and completely vested the fee simple of, in, and to said last named section of land in the said To-pen-ne-ba, his title being full, complete, and perfect on the day the President approved said location, to wit, the 29th of March, 1837.

And your orator furthermore shows, that on the plats of land furnished the land officers at Crawfordsville, Indiana, being within the land district where said section of land is situated, the same was marked, and is yet marked as a reserve to the said To-pen-ne-ba, and was never offered for sale by the United States.

The defendant charges that no officer or officers of the United States had or could legally or lawfully have any power, authority, or jurisdiction over said section of land to sell or dispose of the same, or any part thereof to the said Huett, or any one else, after said location and confirmation aforesaid; and that patent to said Huett for a part of said section of land aforesaid, is utterly void and of no effect whatever; that he, said Hewett, had no more right to purchase one-eighth of said section of land at the time he did, than any other person would now have the legal right to purchase from the United States the remainder of the said reserved section.

The defendant charges that the fee to the remainder of said land was sold, or rather attempted to be sold. Said Hewitt is

not now in the United States of America, and has not been since the 29th of March, 1837. That if the United States had power to sell a portion of said land to Hewitt, in 1841, four years after said location aforesaid, she now has power and authority, not only to sell the balance of said reserved section, but to sell and patent all the reserved land named in said report aforesaid, made by said J. T. Douglas, and approved by the President. The defendant contends that such a position is at war with every principle of law, equity, common justice, and moral right, and cannot be tolerated in a court of justice and equity.

The defendant charges that the title so patented to Hewitt, passed immediately to the said To-pan-ne-ba, from the United States of America, on the 29th of March, 1837, under said treaty and location, and that said To-pan-ne-ba or his grantees, one of whom is now in possession of it, to wit, Edward C. Sumner, have the full, legal, and perfect title in fee simple, to the same and every part thereof.

The defendant charges that it is not now nor never was pretended that the said Colemans' and Banta, or either of them, ever had any title to said fractional quarter whatever, other than what they derived by and through said Hewitt.

MACE and WILSON,
Attorneys for Verden.

And thereupon the plaintiff files his demurrer to said answer as follows, to wit:

Complaint to foreclose a mortgage.

In the Benton circuit court, of the March term, A. D. 185

ISAAC COLEMAN
vs.
SAMUEL VERDEN.

The plaintiff demurs to the answer of the defendant herein, and says that the same is not sufficient in law.

BAIRD, *for Plaintiff.*

And thereupon the court overrules said demurrer, and order that the plaintiff reply to said answer; and thereupon the plaintiff files the following reply to said answer, to wit:

Reply.

In the Benton circuit court, of March term, 1856.

STATE OF INDIANA,
Benton county.

ISAAC COLEMAN
vs.
SAMUEL VERDEN.

The plaintiff, for reply to the answer herein filed, says that he

admits the purchase at the time mentioned in said answer of the land therein described from the plaintiff and the said Samuel Coleman; that the legal title in fee to said lands was at the time in said Banta, who shortly after said sale, at the instance of this plaintiff and the said Samuel Coleman, and in pursuance of said purchase, conveyed the same by deed in fee to the defendant.

This plaintiff further admits, that the defendant at the same time purchased from this plaintiff and the said Samuel Coleman, the other lands described in said answer; that this plaintiff, about the same time, by deed in fee, conveyed said other lands to said defendant.

This plaintiff further admits, that the price at which said lands were so purchased, and the consideration for which they were so sold and conveyed, is correctly and truly stated in said answer; he also admits the payment to him at the time of said purchase of two thousand dollars of the purchase money, and that the remainder thereof was secured by the promissory note of the defendant, payable to the plaintiff, which note is correctly in said complaint and answer. The said note is now in the possession of the plaintiff, and he asks leave to produce and prove the same as an exhibit, and refer thereto as an exhibit for greater certainty on the final hearing of this cause.

This plaintiff further admits the execution by said defendant to this plaintiff, for the purpose named in said complaint and answer, of the mortgage therein referred to, and that said mortgage contains the proviso and power of sale named in said complaint, and is in the usual form of a mortgage upon real estate. The said mortgage is now in the possession of this plaintiff, and he asks leave to produce and prove the same as an exhibit, and refer to as an exhibit for greater certainty on the final hearing of this cause.

This plaintiff, further replying, admits that the deed so made by said defendant, and the note and mortgage so executed to this plaintiff, were all made, executed, and delivered with the full knowledge, consent, and approbation of the said Samuel Coleman, Isaac Banta, and of this plaintiff, and that the contract of purchase of said land was entire.

This plaintiff further replying, says that he admits that the southwest fractional quarter of section thirty-one, in township twenty-six north, of range nine west, is a part of the lands so sold, and for which said two thousand dollars were paid and said note executed, and that the same was originally patented by the United States of America to said Hewitt, at the time mentioned in said answer, and that exhibit marked "A," and made a part of said bill of complaint, is the original patent so issued to said Hewitt.

He further admits that said Banta and this plaintiff derived their title, which they conveyed to said defendant, wholly through said Hewitt, but he expressly denies that said Hewitt's title

thereto commenced with or rests upon said patent, but on the contrary, he charges that long anterior to the said location which is mentioned in said answer and approved thereof by the President, some time in the year 1832, after the said tracts referred to in said answer, the said Hewitt settled upon and cultivated a portion of said land described in said patent, and continued in the possession and cultivation of a part thereof, until after the passage and approval of the pre-emption law of the 19th June, 1834, and that said Hewitt cultivated a part thereof in 1833, and that immediately after the passage and approval of said law, and before the expiration of two years from the passage of said act, the said Hewitt made three several applications to the register of the land office, at Crawfordsville, Indiana, to prove his claim as a pre-emption settler upon said lands, and to enter and pay for the same; which said application was refused by said register, for the reason that the township plats of the land in which said claim was located had not been received at said office.

This plaintiff, further replying, saith that the said Hewitt continued in the occupation and possession of said land, and the cultivation of a part thereof, until in August, 1840, when he again made application to the register and receiver of said land office to prove his claim as a pre-emption settler upon said land, and to enter and pay for the same, and that the affidavit of the said Hewitt and of the witness by him then offered in support of the same, were then certified and approved by said receiver and register, and forwarded to the General Land Office at Washington for the further action of that department and the President of the United States; and that shortly after said evidence had been so filed in the General Land Office at Washington, the original patent, which is made a part of said answer, was issued in pursuance of said evidence and application, and by the authority of the United States of America to the said Hewitt, and in recognition of the rights of the said Hewitt as a pre-emptioner. Copies of the said original application of said Hewitt, in pursuance of which said patent was issued, and of the evidence in support thereof from the General Land Office, duly certified, are herewith filed and marked "exhibit A," and made a part of this reply, and read in the words and figures following, to wit:

Testimony of Hannaniah Hewitt, offered in support of his right of pre-emption to the SW. fr. quarter of section 31, in town. 26 N., range 9 west, under the act of the 22d June, 1838, and of 1st of June, 1840, in the presence of the register and receiver of the land office at Crawfordsville, Indiana, on the 6th August, 1840.

Samuel Williams, being of lawful age, and duly sworn according to law, deposeth and saith, that he has resided in the neighborhood of Hannaniah Hewitt, and been personally acquainted with him from the year 1833, and can state from my own know-

ledge that Mr. Hewitt has resided upon and cultivated the southwest fractional quarter of section 31, township 36 north, of range 9 west, in the district of lands subject to sale at Crawfordsville, Indiana, from that time to the present; that he has a dwelling-house on the same, and is a married man and a housekeeper; that he has also made an improvement and erected a dwelling-house on the E. ½ of the SE. quarter of 31, town. 26 north, range 10 west, which he entered jointly with Augustus W. Bingham, under the act of the 22d June, 1838, and that there is no person, other than Mr. Hewitt's own family, is now, or has been living upon or in possession of the said southwest fractional quarter of section 31, in township 26 north, of range 9 west, excepting that there has been an Indian reservation on the same; and further this deponent saith not.

SAMUEL WILLIAMSON.

Sworn to and subscribed before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this sixth day of August, 1840.

LEVERITT G. BOVIS, *J. P.* [SEAL.]

Bethnel P. Williamson, being of lawful age, and duly sworn according to law, deposeth and saith, that he has lived in the nighborhood of Hannaniah Hewitt since the year 1833, and has been personally acquainted with the said Hewitt since said year 1833, and can testify from his own personal knowledge that Mr. Hewitt has cultivated the southwest fractional quarter of section 31, in town. 26 N., range 9 west, in the district of lands subject to sale at Crawfordsville, Indiana, for the last seven years; that he has a dwelling-house on the same, in which he has lived, and that the said Hewitt has a wife and two children; that no other person, other than Mr. Hewitt and his family, is now, or has been living on, or has been in possession of the said southwest fractional quarter of section 31, in township 26 north, range 9 west, excepting that there has been an Indian reservation on the same; and further saith not.

BETHNEL P. WILLIAMSON.

Subscribed and sworn to before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this sixth day of August, 1840.

LEVERETT G. BOVIS, *J. P.* [SEAL.]

John Wasley B. Hewitt, being of lawful age, and duly sworn according to law, deposeth and saith, that he went on to the prairie lands with his father, Hannaniah Hewitt, in the year 1832, and that he assisted his father in making an improvement in said year on what is now the southwest fractional quarter of section 31, in township 36 north, of range 9 west, in the district of lands subject to sale at Crawfordsville, Indiana, and that he has resided

with his father ever since the year 1832, who has lived on said tract, and cultivated land on said fractional quarter every year since the year 1832, and that no other person other than the said Hannaniah Hewitt and his family has lived upon, or has made any improvement at any time in the southwest fractional quarter of section thirty-one, township twenty-six north, of range nine west; and further saith not.

JOHN WESLEY B. HEWITT.

Subscribed and sworn to before me, the undersigned, a justice of the peace in and for the county of Montgomery, and State of Indiana, this 6th day of August, 1840.

LEVERETT G. BOVIS, *J. P.* [SEAL.]

We hereby certify that Samuel Williams, Bethnel P. Williams, and John Wesley B. Hewitt, the witnesses testifying in relation to the pre-emption right of Hannaniah Hewitt, and named in the foregoing testimony, are, so far as our knowledge extend, men of respectability, and entitled to credit.

LEVERETT G. BOVIS, *J. P.*
EZEKIEL McCONNELL, *Reg'r.*
MARK CONNER, *Receiver.*

Affidavit of Hannaniah Hewitt, under the act of 22d June, 1838, and of the 1st June, 1840, relation to his right of pre-emption to the southwest fractional quarter of section thirty-one, township (26) twenty-sixth north, of range nine west:

"I, Hannaniah Hewitt, of Benton county, (formerly constituing a part of the county of Jasper,) in the State of Indiana, do solemnly swear that I settled upon and cultivated a portion of public lands in the district of Crawfordsville, Indiana, in the year 1832, and erected a dwelling-house thereon, in which I have resided, together with my family, ever since; that in the year following I erected an additional building, which has been occupied by my family as a dwelling-house in connection with the other; that when the public lands in that region were surveyed in the year 1834, the line dividing ranges nine and ten west, of township twenty-six north, threw a portion of my improvements on the southwest fractional quarter of section thirty-one, in township twenty-six north, of range nine west, and a portion in the east half of the southeast quarter of section thirty-six, in township twenty-six north, of range ten west, both of which tracts I have cultivated from that time to the present; that I was then, and still am, a housekeeper, (having a wife and two children,) and in possession by personal residence thereon of the said southeast fractional quarter of section 31, in township 26 north, of range 9 west; that I entered upon the same in my own right, and exclusively for my own use and benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner with

any person or persons whatever, by which the title which I might acquire from the government of the United States should enure to the use or benefit of any one except myself, or to convey or transfer the said land, or the title which I may acquire to the same, to any other person or persons whatever, at any subsequent time, and that no other person has any right or pre-emption thereto, to the best of my knowledge and belief; and I claim the right of pre-emption to the said tract, under the acts of the 22d June, 1838, and the 1st of June, 1840.

HANNANIAH HEWITT.

Subscribed and sworn to before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this 6th day of August, A. D. 1840.

LEVERITT G. BOVIS, *J. P.* [SEAL.]

WAR DEPARTMENT,
Office Indian Affairs, 26 April, 1839.

SIR: With reference to a communication of the 7th September, 1838, from your office in relation to the claim of Hannaniah Hewitt, of Indiana, to the west half of the southwest quarter of section thirty-one, in township twenty-six north, of range nine west, I inform you that, on the recommendation of this office, after a careful examination of the subject, the location for To-pen-ne-bee, so far as it covers the west half of the southwest quarter of the tract above designated, has been set aside by the Secretary of War.

The papers enclosed were received informally from your office, and, as they relate to the case in question, are returned herewith.

Very respectfully, your mo. obt. servt.,
D. KURTZ,
Acting Com'r.

JAMES WHITCOMB, esq.,
Commissioner Genl. Land Office.

TREASURY DEPARTMENT,
August 28th, 1835.

SIR: A copy of a letter addressed to the President upon the subject of locations made under the Potawatomie treaty, which will interfere with claims under the pre-emption acts of June, 1834, and the improvements of the settlers, together with the decision of the President on the questions submitted, is herewith enclosed; you will instruct the land office accordingly. It is understood to be the intention of the War Department to confer with the land office before any floating locations under the treaty are fully approved, with a view to correct any errors.

I am, very respectfully, your obedient servant,

LEVI WOODBURY,
Sec'y of Treasury.

COMMISSIONER OF THE GENERAL LAND OFFICE.

P. S. Depositions in the case of Pierré & Molten, and a list of pre-empt. claims which conflict with the locations under the treaty, are herewith enclosed.

(Copy.)

TREASURY DEPARTMENT,
August 27th, 1835.

SIR: In reference to the within list of pre-emption claims in Laporte land district, upon which reservations under the treaty with the Pottawattamies, approved the 21st of January, 1833, have been located, I have the honor to observe, that by the instructions from this department, dated the 23d of May last, the register of the land office at Laporte was informed that it had been decided, with your approbation, that persons holding floating rights of entry under treaty stipulations, were entitled to a preference over those claiming a right of entry under the provisions of the pre-emption act of the 19th of June, 1834. In making this communication, I was governed by the principle assumed in the execution of the treaty with the Choctaws, concluded at Dancing Rabbit Creek. By the provisions of the treaty with the Pottawottomies, reservations not specially prescribed shall be located under your direction. Accordingly, in the instructions from the War Department, the locating agent was directed to locate the following reservations upon lands of "average value for agricultural purposes, neither the best nor the worst, but such as are of a just medium." It nevertheless appears, that instead of satisfying the reservations of the treaty with lands of medium quality and value, the agent has in numerous instances selected lands upon which pre-emption claims have been laid and admitted, and which have derived increased value from the labor and improvements of the bona fide settler.

Under these circumstances, I would respectfully submit for your consideration whether it would not be proper to withhold your sanction from such locations, not specially defined in the treaty, as may interfere with settlers whose rights have been recognized, and who have consequently been permitted to purchase the lands occupied by them; that the land officers be so advised, and that the agent be directed to locate the undefined reservations of the treaty, in strict conformity with the instructions of the War Department. Understanding that there is a number of settlers having extensive improvements who do not come within the provisions of the pre-emption laws, but who are waiting the approach of the public sales to compete for the purchase of the same, I would also submit for your decision whether the improvements of such persons should not be exempted from location under treaty reservations?

I have the honor to be, very respectfully, your ob. servt.,

LEVI WOODBURY,
Secretary of the Treasury.

To the PRESIDENT OF THE UNITED STATES.

This indenture, made the ninth day of June, in the year of our Lord one thousand eight hundred and forty-three, between Lorenzo D. Hewitt, of the county of Coles, and State of Illinois, of the first part, and Isaac V. Banta, of the county of Fountain, and State of Indiana, of the second part, witnesseth: that the said party of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged by the said party of the first part, has granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, and his heirs and assigns forever, all the tracts or parcels of lands lying and situated in the county of Benton, and State of Indiana, and known as follows, to wit: The east half of the southeast quarter of section thirty-six, in township twenty-six north, of range ten west, containing eighty acres, also the southwest fractional quarter of section thirty-one, township twenty-six north, of range nine west, containing eighty-two acres and sixty-nine hundredths of an acre, in the district of lands subject to sale at Crawfordsville, Indiana, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits therefor: To have and to hold the said premises, parcels, or lots of land above particularly described, with the appurtenances aforesaid, to the sole and only benefit and behoof of the said party of the second part, his heirs and assigns forever; and the said party of the first part, for himself and his heirs, executors, and administrators, do covenant and agree to and with the said party of the second part, his heirs and assigns, that he, the said party of the first part, is lawfully seized of the premises hereby conveyed as of a good, sure, perfect, and absolute estate of inheritance in the law in fee simple; that the same are free and clear of all incumbrances whatsoever, and that he has good right to sell and convey the same in manner and form aforesaid; and further, that he, said party of the first part, and his heirs, executors, and administrators, shall and will warrant and forever defend the said party of the second part, his heirs and assigns, in the quiet and peaceable possession of the above granted premises, against all and every person or persons whomsoever lawfully claiming or to claim the same and every part and parcel thereof.

In testimony whereof, the said Lorenzo D. Hewitt, party of the first part, has hereunto set his hand and affixed his seal, the day and year first above written.

LORENZO D. HEWITT. [SEAL.]

Signed, sealed, and delivered in the presence of—
ANDREW HIXON.

STATE OF INDIANA,
Fountain county.

Personally appeared before me, the undersigned, Andrew Hixon, a justice of the peace of said county, Lorenzo D. Hewitt, and acknowledged the deed of conveyance to which this is annexed to be his act and deed for the purposes therein mentioned.

Given under my hand and seal this ninth day of June, 1843.

ANDREW HIXON, *J. P.* [SEAL.]

Also, duly authenticated copies of the application of said Hewitt for a patent, and the evidence in support thereof, which are made a part of said reply, and marked exhibit "A," also, a copy of the report of T. Hartley Crawford, and approval thereof, duly authenticated, made a part of said reply, and marked exhibit B, which were all the evidence given on the trial of said cause; upon which said evidence the court rendered the judgment and decree elsewhere in this record to be found, to the rendering of which said judgment and decree the defendant at the time, by his counsel, excepted, and prays that his bill of exceptions may be signed and sealed by the court, and made a part of the record herein, which is accordingly done.

A. INGRAM. [SEAL.]

And prays an appeal from the above judgment to the Supreme Court of this State, which is granted upon his filing bond in the penal sum of six thousand dollars with Edward O. Sumner as surety thereon, who is approved by the court within thirty days from this date.

And now at this time, to wit, on the 22 day of March, 1856, comes the said defendant, and files the following bond, to wit:

"Know all men by these presents, that we, Samuel Verden and Edward C. Sumner, are held and firmly bound unto Isaac Coleman in the penal sum of six thousand dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents, signed with our hands, and sealed with our seals, and dated this 22 day of March, 1856.

The condition of the above obligation is such, that whereas the above bound Samuel Verden has prayed an appeal (and it being granted by the court) to the supreme court of the State of Indiana, from the judgment of the Benton circuit court, in the State of Indiana, rendered against him, and in favor of the said Isaac Coleman: now, if the said Samuel Verden will duly prosecute his appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against him, then the above obligation is to be null and void, else to be and remain in full force and virtue in law.

E. O. SUMNER. [SEAL.]

STATE OF INDIANA,
Benton county.

I, Hartley T. Howard, clerk of the Benton circuit court, in the State of Indiana, do hereby certify that the above and foregoing is a full, true, and complete of the above entitled cause, as appears from the records of said court now remaining on file in my office.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at office in Oxford, this 5th [L. S.] day of April, 1856.

HARTLEY T. HOWARD,
Clerk B. C. C.

The appellant's assignment of errors in the above entitled cause read as follows:

In supreme court. From Benton cir. court on appeal.

SAMUEL VERDEN }
vs.
ISAAC COLEMAN. }

The said defendant, now the appellant, assigns the following errors, to wit:

1st. The court erred in not sustaining the demurrer to the reply.

2d. The court erred in rendering judgment for the plaintiff, when from the record judgment should have been for def't.

MACE and WILSON, *for App't.*

There is no error in the foregoing record.

Z. BAIRD, *for Def't.*

And afterwards, to wit, at a court began and held on the 26th of May, 1856, and continued from day to day until November 22d, 1856, at which time comes the appellant, and on his motion this cause is continued to the next term of this court.

And afterwards, to wit, at a court began and held on the 24th of November, 1856, and continued from day to day until May 23d, 1857, at which time comes the appellant, and on his motion this cause is continued to the next term of this court.

And afterwards, to wit, at a court began and held on the 25th of May, 1857, and continued from day to day until May 27th, 1857, at which time come the parties, by their attorneys, and the assignment of errors and answer thereto having been filed, submit this cause to the court, but the court not being sufficiently advised in the premises, take time to advise thereon.

And afterwards, to wit, at a court began and held on the 25th of May, 1857, and continued from day to day until August 6th, 1857, at which time come the parties, by their attorneys, but the

court not being sufficiently advised in the premises, take time to advise thereon.

And afterwards, at a court began and held on the 23d of November, 1857, and continued from day to day until May 22d, 1858, at which time come the parties, by their attorneys, but the court not being sufficiently advised in the premises, take time to advise thereon.

And afterwards, at a court began and held on the 24th day of May, 1858, and continued from day to day until June 26th, 1858, at which time come the parties, by their attorneys, and the court being fully advised in the premises, give the following opinion and judgment pronounced:

Per Cunain. Appeal. Benton C. C.

SAMUEL VERDEN
vs.
ISAAC COLEMAN.

The facts of this case, and the questions of law arising in the record before us, are precisely similar to those in a case between the same parties, decided at the November term of this court, 1853. (See Verden vs. Coleman, 4 Ind., 457.) Upon the authority of the case cited, the judgment in the present case must be affirmed. It is therefore considered by the court, that the judgment of the court below in the above entitled cause, be in all things affirmed at the cost of the appellant, with one per cent. damages in the judgment below—all of which is ordered to be certified to said court; and it is further considered by the court, that the appellee recover of the appellant the sum of dollars and cents for his damage, as also the further sum of dollars and cents, for his costs and charges in this behalf laid out and expended.

And afterwards, to wit, at a court began and held on the 24th of May, 1858, and continued from day to day till July 16th, 1858, at which time come the appellant, by Hon. D. Mace, his attorney, and prays an appeal to the United States Supreme Court, which prayer is granted.

And afterwards, to wit, on the day last aforesaid, to wit, the 16th day of July, at which time come the appellant, by Hon. D. Mace, his attorney, and filed his appeal bond in the clerk's office of the supreme court, which appeal bond is in the words and figures following, to wit:

Know all men by these presents, that we, Samuel Verden and Daniel Mace, of the State of Indiana, are held and firmly bound unto Isaac Coleman in the penal sum of seven thousand dollars, to be paid to the said Isaac Coleman, his executors and administrators; to the payment of which well and truly to be made, we

bind ourselves and each of us, jointly and severally, our heirs and executors, firmly by these presents, sealed with our seals, and dated this 16th day of July, 1858.

Whereas the above named Samuel Verden hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment in the above cause rendered by the supreme court of the State of Indiana, May term, 1858:

Now, therefore, the condition of the above obligation is such, that if the above named Samuel Verden shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, else remain in full force and virtue.

DANIEL MACE. [SEAL.]

Approved by me July 16th, 1858.

SAM'L E. PERKINS,
Judge.

State of Indiana, ss.

I, William B. Beach, clerk of the supreme court of the State of Indiana, do certify that the foregoing is a full and correct copy of the record and opinion of said court in the case as above entitled, brought before said supreme court from the Benton circuit court.

In testimony whereof, I hereto subscribe my name and affix the seal of supreme court, at the city of Indianapolis, this [L. S.] twenty-eighth day of July, A. D. 1858.

W. B. BEACH, *C. S. C.*
By JOSEPH S. KENTZEL, *Deputy.*